

1 KATHERINE JOHNSON (CA SBN 259854)
2 CASPER J. RANKIN (CA SBN 249196)
3 PITE DUNCAN, LLP
4 4375 Jutland Drive, Suite 200
5 P.O. Box 17933
6 San Diego, CA 92177-0933
7 Telephone: (858) 750-7600
8 Facsimile: (619) 590-1385

Attorneys for BANK OF AMERICA, NA, AS SUCCESSOR BY MERGER TO LASALLE
BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
CERTIFICATEHOLDERS OF BEAR STEARNS ASSET BACKED
SECURITIES TRUST 2005-3, ASSET-BACKED CERTIFICATES, SERIES
2005-3

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

In re
NICOLE CHRISTINA MCCONVILLE,
Debtor(s).

Case No.09-71561

Chapter 7

R.S. No. CJR-487

MOTION FOR RELIEF FROM
AUTOMATIC STAY
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: February 19, 2010
TIME: 11:00am
CTRM: 201

1300 Clay Street, Suite 300
Oakland, CA 94604-1426

Bank of America, NA, as successor by merger to LaSalle Bank National Association, as
Trustee for Certificateholders of Bear Stearns Asset Backed Securities Trust 2005-3, Asset-
Backed Certificates, Series 2005-3 ("Movant"), moves this court for an order terminating the
automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all
acts necessary to enforce its security interest in real property generally described as 37033
Maple Street, Fremont, California 94536.

1 On or about December 2, 2009, Nicole Christina McConville ("Debtor") filed a
2 voluntary petition under Chapter 7 of the Bankruptcy Code, and Tevis Thompson was appointed
3 as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtor and
4 the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

5 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and
6 362(d)(2).

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I.**

9 **MOVANT IS ENTITLED TO RELIEF FROM THE**
10 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

11 **NO EQUITY**

12 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
13 debtor does not have any equity in the property and the property is not necessary to the debtor's
14 effective reorganization.

15 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
16 § 362(d)(2) reflects congressional intent to allow creditors to
17 immediately proceed against the property where the debtor has no
18 equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1).
(Emphasis added).

19 Id. at 610 (emphasis added).

20 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court
21 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all
22 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief
23 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194
24 (9th Cir. 1984).

25 An appropriate cost of sale factor should also be added to determine if the debtor has
26 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.
27 283, 289 (Bankr. S.D. Cal. 1982).

28 On or about April 6, 2005, Debtor, for valuable consideration, made, executed and
delivered to Silver Staff Financial Services, dba Silver State Mortgage ("Lender") a Note in the

1 principal sum of \$581,250.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make
2 monthly principal and interest payments commencing June 1, 2005, and continuing until May 1,
3 2035, when all outstanding amounts are due and payable. The Note provides that, in the event
4 of default, the holder of the Note has the option of declaring all unpaid sums immediately due
5 and payable. A true and correct copy of the Note is attached to the Declaration in Support of
6 Motion for Relief From Automatic Stay as exhibit A and incorporated herein by reference.

7 On or about April 6, 2005, the Debtor made, executed and delivered to Lender a Deed of
8 Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
9 described as 37033 Maple Street, Fremont, California 94536 (the "Real Property"), which is
10 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and
11 costs incurred as a result of the Debtor's bankruptcy case may be included in the outstanding
12 balance under the Note. The Deed of Trust was recorded on April 12, 2005, in the Official
13 Records of Alameda County, State of California. A true and correct copy of the Deed of Trust
14 is attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit B
15 and incorporated herein by reference.

16 Subsequently, all beneficial interest in the Note and the Deed of Trust was sold,
17 assigned and transferred to Movant. A true and correct copy of the Corporation Assignment of
18 Deed of Trust evidencing the Assignment of the Deed of Trust to Movant is attached to the
19 Declaration in Support of Motion for Relief From Automatic Stay as exhibit C and incorporated
20 herein by reference.

21 The obligation under the Note is in default as of December 1, 2008, for failure to make
22 payments to Movant. As of December 15, 2009, the total obligation due and owing under the
23 Note is in the approximate amount of \$624,426.11, representing the principal balance of
24 \$561,295.55, interest in the sum of \$41,473.37, late charges in the amount of \$1,430.14,
25 accumulated NSF charges of \$25.00, escrow advances in the amount of \$17,360.48, a
26 recoverable balance in the amount of \$2,841.02, and other fees in the amount of \$0.55. This is
27 an approximate amount for purposes of this Motion only, and should not be relied upon as such
28 to pay off the subject loan as interest and additional advances may come due subsequent to the

1 filing of the Motion. An exact payoff amount can be obtained by contacting Movant's counsel.
2 Further, Movant has incurred additional post-petition attorneys' fees and costs in bringing the
3 instant Motion. Moreover, the total arrears under the Note are in the approximate sum of
4 \$85,611.54, excluding the post-petition attorneys' fees and costs incurred in filing the instant
5 Motion. A true and correct copy of the contractual payment accounting pursuant to Local Rule
6 4001-1(g)(1) is attached to the Declaration in Support of Motion for Relief From Automatic
7 Stay as exhibit D and incorporated herein by reference.

8 **II.**

9 **RELIEF FROM STAY**

10 **LACK OF EQUITY**

11 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and
12 Statements, the fair market value of the Property is approximately \$312,500.00. True and
13 correct copies of the Debtor's bankruptcy Schedules "A" and "D" are collectively attached to
14 the Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and
15 incorporated herein by reference.

16 Based on the above, Movant maintains that the equity in the Property is as follows:

17	Fair Market Value:	\$312,500.00
18	Less:	
19	Movant's Trust Deed	\$624,426.11
20	HomeEQ Servicing – 2 nd Deed of Trust	\$153,066.00
21	Costs of Sale (8%)	\$25,000.00
22	Equity in the Property:	\$<489,992.11>

23 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since
24 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is
25 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

26 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real
27 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtor's
28 Statement of Intent is attached to the Declaration in Support of Motion for Relief From
Automatic Stay as exhibit F and incorporated herein by reference.

///

1 **III.**

2 **MOVANT IS ENTITLED TO RELIEF FROM THE**
3 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

4 **CAUSE - LACK OF ADEQUATE PROTECTION**

5 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to
6 adequate protection of its interest in the Property.

7 Movant submits that adequate protection in this case requires normal and periodic cash
8 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed
9 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

10 Movant is informed and believes that Debtor is presently unwilling or unable to provide
11 adequate protection to the Movant and there is no probability that adequate protection can be
12 afforded to Movant within a reasonable time.

13 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
14 § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

15 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

16 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the
17 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of
18 Trust;

19 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

20 3. Granting Movant leave to foreclose on the Real Property and to enforce the
21 security interest under the Note and the Deed of Trust, including any action necessary to obtain
22 possession of the Property;

23 4. Permitting Movant to offer and provide Debtor with information re: a potential
24 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan
25 Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;

26 5. Alternatively, in the event this court declines to grant Movant the relief requested
27 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to
28 reinstate and maintain in a current condition all obligations due under the Note and Deed of

1 Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations
2 to pay when due (a) the monthly installments of principal and interest, as required under the
3 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor
4 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs
5 incurred in the filing of this motion;

6 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion
7 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy
8 law; and

9 7. For such other and further relief as the court deems just and proper.

10
11 Dated: January 22, 2009

PITE DUNCAN, LLP

12
13 /s/ CASPER J. RANKIN (CA SBN 249196)
14 Attorneys for BANK OF AMERICA, NA, AS
15 SUCCESSOR BY MERGER TO LASALLE
16 BANK NATIONAL ASSOCIATION, AS
17 TRUSTEE FOR CERTIFICATEHOLDERS OF
18 BEAR STEARNS ASSET BACKED SECURITIES
19 TRUST 2005-3, ASSET-BACKED
20 CERTIFICATES, SERIES 2005-3
21
22
23
24
25
26
27
28